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FEDERAL COMMUNICATIONS COMMISSION
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Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-261
Equal Employment Opportunities	)	

To: The Commission

REPLY COMMENTS OF TIME WARNER CABLE

Fleischman and Walsh
1400 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 939-7900

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Summary

A range of commenters shared Time Warner's concern with the proposed definition of "Corporate Officer." By eliminating the vague reference to fiduciaries and providing specific titles of those who should be considered officers, Time Warner believes that its proposed definition is responsive to these concerns, and would limit the job category to individuals who are "principal decision-makers" with "supervisory authority," as Congress intended. Time Warner submits that there is no reason to revise any other proposed or existing definition.

Time Warner's Comments in this proceeding expressed the belief that the Commission should utilize existing procedures as much as possible in implementing EEO requirements under the 1992 Cable Act. Contrary to some of the comments filed, it is clear from the statute and legislative history that Congress did not intend to enact a drastic overhaul of the Commission's cable EEO procedures. Nor did Congress find, as one commenter claims, a "pattern of employment discrimination" in the cable industry justifying sweeping changes to FCC procedures.

Specifically, the questions listed in Section III of the Annual Employment Report have not proven to be unreliable. There is no reason to make the voluntary procedure by which an MSO may file all of its Annual Employment Reports together mandatory. Nor does the Commission need to drastically increase the number of on-site EEO audits. The existing procedure of targeting those operators with apparent deficiencies through a paper investigation has proven effective, makes the most efficient use of

limited FCC resources, and minimizes the burdens on operators. The Commission should also reject a proposal that it hold a hearing or conduct an investigation concerning a franchisee's character qualifications if a discrimination complaint has been filed in another forum, even before that complaint has been resolved. It would be wasteful and senseless for the Commission to analyze a complaint, conduct an investigation, take testimony on the allegations, and resolve the merits of such complaint at the same time as another expert agency performs exactly the same tasks.

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Time Warner Cable ("Time Warner") respectfully submits these Reply Comments in the above-captioned proceeding to implement the equal employment opportunity ("EEO") provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act").

1. Definition Of Job Categories.

A range of commenters shared Time Warner's concern with the proposed definition of "Corporate Officer" as any "employee with official authorization to represent the company in a fiduciary capacity."[1] The National Cable Television Association, Inc.

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[1]Notice of Proposed Rule Making, FCC 92-539, released January 5, 1993 at Exhibit H.

("NCTA") pointed out that different company personnel who fall in a number of job categories, including all in-house counsel, may act as fiduciaries.[2] The New York State Commission on Cable Television ("NYSC") argued that acting in a fiduciary capacity is a characteristic which "surely transcends" the Corporate Officer category.[3] Similarly, the Office of Communication of the United Church of Christ ("UCC") noted that "fiduciary" is a legal term of art subject to many interpretations.[4]

Time Warner's Comments proposed a definition of Corporate Officer based on federal securities law:

> a president, vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated.[5]

Time Warner believes that by eliminating the vague reference to fiduciaries and providing specific titles of those who should be considered officers, its proposal is responsive to the concerns voiced by the commenters. In addition, this definition would limit the job category to individuals who are "principal

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[2]NCTA Comments at 5.

[3]NYSC Comments at 2.

[4]UCC Comments at 15.

[5]17 C.F.R. Sec. 230.405.

decision-makers" with "supervisory authority," as Congress intended.[6]

Time Warner does not agree with the NYSC that the existing definition of "Professionals" establishes an overly-broad "catch-all" which will be used inaccurately by cable operators, or be of little assistance to the Commission.[7] On the contrary, the Commission adopted the Equal Employment Opportunity Commission's ("EEOC") own definition of this category, which is thus the same definition used by countless industries and firms subject to EEO reporting requirements.[8] The same definition (with different examples) is used in the Broadcast Annual Employment Report (FCC Form 395-B). Clearly, neither the Commission nor the EEOC has found this definition unduly broad. Moreover, the adoption of a different description now would thwart comparisons with past reports and with data collected for other industries. Nor should the Commission distinguish between licensed and unlicensed professionals.[9] The existing category was not only taken from the standard EEO-1 form, used by other industries, but was

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[6]47 U.S.C. Sec. 554(d)(3)(B).

[7]NYSC Comments at 2.

[8]Cable Communications Policy Act Rules (EEO), 58 RR 2d 1572, 1584 (1985)("EEO Rules").

[9]NYSC Comments at 2.

specified in the Cable Communications Policy Act of 1984 and again in the 1992 Cable Act.[10]

Time Warner also disagrees with the NYSC that a "Manager" such as a program director, budget officer, promotion manager, public affairs director or chief engineer must necessarily have the power to hire and fire other employees, if she or he otherwise sets broad policies, exercises overall responsibility for execution of those policies, or directs an individual department or a special phase of the firm's operations.

2. Memorandum Of Understanding.

The NCTA, like Time Warner, advocates that the Commission initiate negotiations with the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") in order to reduce the overlapping EEO requirements imposed on cable operators serving military bases. As the NCTA's Comments recognize, the OFCCP requirements seem to have substantial similarities with those of the FCC, and precedent exists for such a memorandum of understanding.[11]

3. The Commission Should Not Adopt Changes To Its EEO Procedures Beyond Cable Act Requirements.

Time Warner's Comments in this proceeding expressed the belief that the Commission should utilize existing procedures as much as possible in implementing Cable Act EEO requirements. It

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[10]EEO Rules, 58 RR 2d at 1584; 47 U.S.C. Sec. 554(d)(3)(A).

[11]NCTA Comments at 10.

continues to believe that these procedures will serve the Congressional concerns underlying the statute well, notwithstanding calls for more drastic changes than Congress envisioned.

a. Congress Did Not Intend Drastic Changes To Existing EEO Procedures.

The UCC faults the Commission for failing to recognize that the Cable Act mandates what it calls "sweeping changes" in EEO enforcement policy.[12] On the contrary, it is clear from the statute and legislative history that Congress did not intend to enact a drastic overhaul of the Commission's cable EEO procedures.

The Cable Act made two significant changes in EEO procedures with regard to cable operators: it added new job categories and related reporting requirements to the annual employment report, and it raised the basic forfeiture amount for EEO violations.[13] Clearly, if other sweeping changes were intended, the statutory language would have detailed them. Moreover, the legislative history does not fault the Commission's general EEO efforts. Rather, it states "[t]he Committee finds that continued rigorous enforcement of equal employment opportunity rules and regulations is required in order to deter effectively racial and gender discrimination."[14] The legislative history makes clear that,

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[12]UCC Comments at 2-3.

[13]47 U.S.C. Sec. 554(d)(3) & (f)(2).

[14]House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 112 ("House Report").

with regard to cable, Congress' specific concern was what it perceived to be the underrepresentation of women and minorities in policy-making positions.[15] Congress imposed reporting requirements for additional job categories not because it concluded that existing procedures were ineffective, but rather "to improve the Commission's ability to . . . evaluate the effectiveness of its rules and enforcement practices" with regard to such positions.[16] There is simply no support in the statute or legislative history for the sweeping changes proposed by the UCC.

Moreover, Congress did not find, as the UCC claims, a "pattern of employment discrimination" in the cable industry justifying sweeping changes to FCC procedures.[17] On the contrary, Congress recognized the overall gains made by cable operators in this area:

> The Committee notes that, while representation of women and minorities in the cable industry overall has improved since adoption of the Cable [Communications Policy] Act, the industry's performance can be improved further.[18]

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[15] Id. at 111.

[16] Id. at 112.

[17] UCC Comments at 3.

[18] House Report at 111 (emphasis added). Similarly, NAACP's assertion that "EEO violations are almost always intentional violations implicating a licensee's character" is completely unjustified. NAACP Comments at 47. The Commission routinely imposes sanctions on licensees for EEO violations which do not rise to the level of intentional misdeeds implicating the licensee's character. See, e.g., Communications Fund, Inc., FCC 92-548, (continued...)

b. No Additional Changes To FCC Form 395-A Are Necessary.

The UCC claims that the violations found in on-site EEO audits of cable operators demonstrate the "unreliability" of the Cable Annual Employment Report. According to the UCC, it examined 85 of those reports filed with the Commission in 1991 and found that 99 percent of all of the questions asked on all of the forms were answered affirmatively. The UCC further claims that, based on "interviews" with FCC staff members, 50 percent of cable operators subject to on-site EEO audits are found to be in violation of some provision of the Cable Communications Policy Act of 1984.[19]

The UCC's study and reasoning are both riddled with errors. No indication is given how the UCC selected just 85 reports from the thousands filed annually by cable entities, or the size, location or other characteristics of the systems selected. The UCC does not claim that these 85 reports are in any way statistically representative of the industry as a whole. Nor does it indicate the range of violations reflected by the 50 percent figure. Significantly, UCC wrongly assumes that systems subject to on-site audits are representative of the industry as a whole. On the contrary, systems subjected to on-site audits have already

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[18](...continued)
released December 16, 1992 (admonishing one renewal applicant, and imposing a forfeiture and reporting conditions on another, for EEO violations where no intent to discriminate found).

[19]UCC Comments at 7-8.

been found to have apparent EEO problems. As the Commission advised in adopting this procedure:

> We intend to concentrate our on-site auditing efforts on those situations that present problems during the paper investigation . . . By directing our efforts toward those situations where there appear to be problems, we believe that we can be most effective in ensuring compliance with the EEO requirements of the Cable [Communications Policy] Act throughout the cable industry.[20]

UCC's unscientific survey proves, if anything, that the existing Annual Employment Reports are adequate and that the Commission's current enforcement system is working well. Section III, Question 2 of FCC Form 395-A asks whether a cable entity contacts minority organizations, women's organizations, media, educational institutions and other potential referral sources whenever job openings arise. In a footnote, UCC concedes that of the reports it reviewed, 10.6 percent of the employment units (9 of 85) answered Question 2 in the negative and an additional 3.5 percent (3 of 85) qualified affirmative answers with exhibits and explanations. Thus, the UCC's own data undermines its argument that no business would be likely to answer such questions in the negative.[21] It also undermines the UCC's suggestion that FCC

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[20]EEO Rules, 58 RR 2d at 1599.

[21]UCC Comments at 9. The UCC also ignores the fact that the information submitted in Form 395-A constitutes a representation to the Commission. The form itself warns that "WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE OR IMPRISONMENT. 18 U.S.C. 1001."

Form 395-A be amended to require the number of recruitment sources of each type contacted each year. Furthermore, the violations found at on-site audits demonstrate that the Commission's regulatory scheme of using paper investigations to target likely violations has proven effective.

The UCC also fails to appreciate that the Commission's EEO review does not rest solely on a cable operator's responses to the inquiries in Section III of Form 395-A. An operator must provide a detailed breakdown of the minorities and women it employs overall and has hired or promoted into the upper-four categories. The Commission compares this information to data for the available labor force using its processing guidelines. FCC certification is based on its review of such data, the responses to Section III, and any EEO complaints on file, and any additional information it may request if an operator's EEO performance appears to be deficient.[22] Accordingly, it is quite unlikely an operator with a poor EEO record will be able to hide this fact simply by answering the questions in Section III affirmatively.[23]

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[22]EEO Rules, 58 RR 2d at 1593-94.

[23]Thus, the UCC's assertion that the nine operators denied certification in 1991 answered all of Section III's questions affirmatively ignores the obvious: their answers, if incorrect, did not prevent the Commission from detecting violations and denying certification.

c. Consolidated Filings Are Unnecessary.

The NAACP argues that every MSO should be required to file all of its systems' Annual Employment Reports at one time. It also advocates simultaneous CARS renewals, to allow the public to "review EEO performance" companywide.[24]

In 1985, the Commission adopted a voluntary system of MSO Reporting Agreements ("MRAs"), pursuant to which MSOs may enter an arrangement with the Commission to consolidate the filing of EEO reports for all of their employment units and coordinate the filing of supplemental information for units under investigation. It specifically rejected suggestions that procedure be made mandatory:

> Since the concept of an MRA is neither required nor contemplated by the Cable [Communications Policy] Act, but rather was intended to benefit the Commission and the MSO, we do not believe that mandatory MRAs would be desirable. Thus, an MSO will not be required to enter into an MRA.[25]

Nor is the MRA concept required or contemplated by the 1992 Cable Act. Thus, there is no more reason to make this procedure mandatory now than there was eight years ago.

The NAACP's request for consolidated CARS renewals, although unexplained, is apparently intended to facilitate the filing of

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[24]NAACP Comments at 19. NAACP's use of the term "annual certifications" is apparently meant to refer to Annual Employment Reports.

[25]EEO Rules, 58 RR 2d at 1601.

petitions to deny on EEO grounds. Although CARS renewals are subject to petitions to deny, neither the Cable Act nor the Communications Act contemplates enforcement of cable EEO regulations through administrative litigation concerning the renewal of auxiliary facilities, but rather through the established certification process.

d. Additional Proposals.

The UCC and NAACP suggest a number of other proposals not contemplated by the Cable Act. For example, the UCC advocates that the Commission allocate funds to increase the number of on-site EEO audits forty times annually (from less than one-half of one percent, according to UCC, to 20 percent of all operators).[26] As noted above, however, the existing procedure of targeting those operators with apparent deficiencies through a paper investigation has proven effective. As the Commission reasoned in 1985, this approach makes the most efficient use of limited FCC resources and minimizes the burdens on operators.[27]

The NAACP asserts that the Commission should hold a hearing on a franchisee's character qualifications if a discrimination complaint has been filed in another forum, even before that complaint has been resolved.[28] It also faults the Commission for failing to seek out current or former employees of a cable system

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[26]UCC Comments at 13.

[27]EEO Rules, 58 RR 2d at 1599.

[28]NAACP Comments at 45.

to verify allegations of discrimination.[29] On the contrary, it would be wasteful and senseless for the Commission to analyze a complaint, conduct an investigation, take testimony on the allegations, and resolve the merits of such complaint at the same time as an expert agency or court performs exactly the same tasks. Thus, pursuant to its character policy for broadcast licensees, the Commission will await final determinations on relevant actions pending before other authorities.[30]

The NAACP also advocates that the Commission raise its processing guidelines for comparing a cable operator's workforce with the available labor market, from 50 percent of parity to 80 percent.[31] But Congress did not intend to alter the existing benchmarks. The Cable Act's legislative history indicates that "[t]he method for comparing the composition of the cable operator's workforce with that of the relevant labor market has not been changed . . ."[32]

4. Conclusion.

As several commenters have recognized, the Commission should revise its proposed definition of the new "Corporate Officer" job category. No revision is needed to the definitions of other pro-

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[29]Id. at 21.

[30]Character Qualifications Policy, 67 RR 2d 1107, 1108 (1990) recon., 69 RR 2d 278 (1991).

[31]NAACP Comments at 37.

[32]House Report at 112.

posed or existing categories, however. Time Warner continues to believe that the Commission should utilize existing procedures as much as possible in implementing Cable Act EEO requirements. Congress did not intend, and there is no reason to adopt, the sweeping changes to existing procedures proposed by some commenters.

Respectfully submitted,

TIME WARNER CABLE

By: Arthur H. Harding

Aaron I. Fleischman
Arthur H. Harding
Christopher G. Wood

Fleischman and Walsh
1400 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 939-7900

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